Supreme Court, U.S.
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No. 15-7

IN THE
Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,
Petitioner,

v.

UNITED STATES AND
COMMONWEALTH OF MASSACHUSETTS
EX REL. JULIO ESCOBAR AND CARMEN CORREA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Whether the False Claims Act prohibits a claimant from billing the government for goods or services when the claimant knows (and fails to disclose) that the goods or services fail to comply with material statutory, regulatory, or contractual requirements (a theory described by some circuits as "implied false certification" liability).

2. Whether, under an "implied false certification" theory, the material statutory, regulatory, or contractual requirement must expressly state that it is a condition of payment by the government.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Background And Purpose Of The FCA 3

B. MassHealth's Provider Regulations For Mental Health Centers 7

C. Factual Background 10

D. Proceedings Below 15

SUMMARY OF ARGUMENT 19

ARGUMENT 22

I. THE FALSE CLAIMS ACT PROHIBITS DEMANDING FUNDS TO WHICH THE CLAIMANT KNOWS IT IS NOT ENTITLED BECAUSE IT HAS VIOLATED THE GOVERNMENT'S PAYMENT CONDITIONS 22

A. The Submission Of Ineligible Claims For Payment Constitutes The Making Of "False Or Fraudulent Claims For Payment Or Approval" 22

B. Implied Certification Liability Is Consistent With The Purposes Of The FCA And The 1986 Amendments 32

C. Petitioner's Policy Arguments For Rejecting Implied False Certification Are Unpersuasive 38

II. LIMITING IMPLIED FALSE CERTIFICATION TO THOSE MATERIAL REQUIREMENTS FORMALLY LABELED "CONDITIONS OF PAYMENT" IS UNJUSTIFIED 41

A. Petitioner's Express-Designation Requirement Has No Basis In The FCA 41

B. Limiting Implied False Certification Would Severely Hamper The Government's Anti-Fraud And Abuse Efforts 46

C. Petitioner's Policy Concerns Are Unfounded And Cannot Justify Rewriting The FCA 50

III. THE FIRST CIRCUIT CORRECTLY REVERSED DISMISSAL OF RESPONDENTS' COMPLAINT 55

CONCLUSION 58

TABLE OF AUTHORITIES

Page

CASES

Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008) 22

Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013) 45

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 38

Chesbrough v. VPA, P.C., 655 F.3d 461 (6th Cir. 2011) 41

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) 44

Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co., 785 F. Supp. 411 (S.D.N.Y. 1992) 30

Cook Cnty. v. United States ex rel. Chandler, 538 U.S. 119 (2003) 22, 50, 53

Durland v. United States, 161 U.S. 308 (1896) 28

Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993 (9th Cir. 2010) 27

Heckler v. Community Health Servs. of Crawford Cnty., Inc., 467 U.S. 51 (1984) 30

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Neder v. United States, 527 U.S. 1 (1999).....28, 45

New York v. Amgen Inc., 652 F.3d 103 (1st Cir. 2011).....17, 54

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Rainwater v. United States, 356 U.S. 590 (1958)..... 34

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Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519 (10th Cir. 2000).....32, 46

Singleton's Adm'r v. Kennedy, 48 Ky. (9 B. Mon.) 222 (1848) 29

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TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) 45

United States v. Bornstein, 423 U.S. 303 (1976)..... 34, 36, 37

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United States v. Gaudin, 515 U.S. 506 (1995)..... 45

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517 F.3d 449 (7th Cir. 2008) 54

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653 F. Supp. 2d 87 (D.D.C. 2009), *aff'd in part, vacated in part, and remanded*, 626 F.3d 1257 (D.C. Cir. 2010) 55

626 F.3d 1257 (D.C. Cir. 2010) 24, 25, 26, 28, 36, 40, 42, 43, 44, 45, 46, 51, 54, 55

United States v. Steffen, 687 F.3d 1104 (8th Cir. 2012) 31

United States v. Triple Canopy, Inc., 775 F.3d 628 (4th Cir. 2015), *petition for cert. pending*, No. 14-1440 (U.S. filed June 5, 2015) 24, 26, 46

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41 F. Supp. 197 (W.D. Pa. 1941), *rev'd*, 127 F.2d 233 (2d Cir. 1942), *rev'd*, 317 U.S. 537 (1943) 35

317 U.S. 537 (1943) 34, 35, 36, 47

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625 F.3d 262 (5th Cir. 2010) 27

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STATUTES, REGULATIONS, AND RULES

Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696, 696 3

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* 45

False Claims Act, 31 U.S.C. §§ 3729-3731 ..... *passim*

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31 U.S.C. § 3729(b)(1)(A)(i)-(iii) 5

31 U.S.C. § 3729(b)(1)(B) 27

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31 U.S.C. § 3729(b)(2)(A)(i) 5

31 U.S.C. § 3729(b)(4) 39, 45

31 U.S.C. § 3730(a) 52

31 U.S.C. § 3730(c)(1) 52

31 U.S.C. § 3730(c)(2) 52

Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* 49

Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 4

Higher Education Act of 1965, tit. IV, 20 U.S.C. § 1070 *et seq.* 38

20 U.S.C. § 1094(a)(20) 53

18 U.S.C. § 1014 29

42 U.S.C. § 1320a-7b (Anti-Kickback Statute) 38, 54

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42 U.S.C. § 1395nn (Stark Law) 54

42 U.S.C. § 1396 *et seq.* 5
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Mass. Gen. Laws:
ch. 6A, § 16 58
ch. 12, § 5A *et seq.* 15
ch. 17, § 2 58
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42 C.F.R.:
§ 430.0 5
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24 Del. Admin. Code § 3500-9.2 48
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Tit. 105, ch. 140:
§ 140.330 ..... 10, 57
§§ 140.500-140.560 9
§ 140.520(D)(1) 10
§ 140.530(C) 10
§ 140.530(C)(1)(a) 10, 18
§ 140.530(E) 10
Tit. 130, ch. 429 ..... 7, 9
§ 429.401 7
§ 429.402 7
§ 429.408(C) 9
§ 429.408(C)(3) 17
§ 429.421(A)(2) 9

§ 429.422(A) 7, 8, 18, 57
§ 429.423 56
§ 429.423(B) 8, 17, 18, 56
§ 429.423(B)(1) 56
§ 429.423(B)(2) 56, 57
§ 429.423(B)(2)(c) 8
§ 429.423(B)(2)(e) 8, 18, 57, 58
§ 429.424 ..... 8, 9, 48, 57
§ 429.424(A)(1) 8
§ 429.424(C)(1) 8
§ 429.424(C)(2) 8
§ 429.424(F)(1) 8
§ 429.432 58
§ 429.435 58
§ 429.438(E) 9
§ 429.438(E)(1)-(2) 9
§ 429.439 ..... 8, 16, 48, 55, 56
§ 429.439(C) 8, 17, 56, 57
§ 429.441 ..... 9, 48, 56
§ 429.441(A) 9, 57
§ 429.441(F) 56
Ohio Admin. Code 4732-13-04 48
Fed. R. Civ. P. 9(b) 19

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INTRODUCTION

Congress enacted the False Claims Act ("FCA") during the Civil War when fraudsters sold the Union Army boots made of cardboard, guns that did not fire, and uniforms woven from recycled rags. The FCA represented Congress's response to the outrage that contractors would knowingly supply deficient goods and services and seek full reimbursement as though they had provided goods and services that conformed to the government's requirements. Congress deemed such claims false or fraudulent even though what was delivered could be called "boots," "guns," and "uniforms," and even though the contractor made no express misrepresentations about the goods' materials or quality.

When Congress modernized the FCA in 1986, rampant fraud on government health-care programs was the new outrage. Under those programs, it is axiomatic that health-care providers will be reimbursed only for treatment by a medical professional who is suitably licensed to provide care or who is appropriately supervised by someone who is properly licensed. As here, those programs have set explicit licensure and supervision standards by regulation so that the public fisc is not impaired by entities that employ personnel who lack the requisite credentials to provide services that taxpayer dollars are used to reimburse. Otherwise, any charlatan could obtain reimbursement under the false pretense that they were licensed to provide medical care.

In this case, petitioner knowingly hired unlicensed, unqualified, and unsupervised "counselors" to provide sensitive mental health services in clear violation of several express requirements of the Massachusetts Medicaid program. Petitioner then billed

the United States and Massachusetts governments as if the services had been provided by qualified and properly supervised mental health professionals in compliance with Medicaid regulations. Respondents discovered these false and fraudulent billing practices from their own investigation into the death of their daughter, a 17-year-old high school student who received gravely inadequate treatment from petitioner's unsupervised and unqualified personnel, including two unlicensed staff members who falsely held themselves out as doctors.

As the case comes to this Court, the issues concern whether the FCA's proscription on the making of "false or fraudulent claim[s]" encompasses billing the government for care provided in knowing violation of Medicaid regulations requiring that mental health providers be properly licensed, qualified, and supervised. This Court should affirm the First Circuit's conclusion that respondents' complaint properly states claims under the FCA because the text and context of the FCA support that result, the common-law background to Congress's enactment of the FCA confirms that Congress intended that construction, and the policy arguments for that reading promote Justice Holmes' famous axiom that those who deal with the government should turn square corners.

STATEMENT OF THE CASE

A. Background And Purpose Of The FCA

1. "The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Spurred by the reports of these "enormous frauds," Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson), Congress enacted "Lincoln's Law" to mobilize a private bar of *qui tam* relators to serve as the government's allies in combating fraud and abuse. *See* James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the* Qui Tam *Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the* United States ex rel. Gravitt v. General Electric Co. *Litigation*, 18 Ohio N.U. L. Rev. 35, 35-36 (1991).

The FCA originally prohibited the "knowing" submission of "false, fictitious, or fraudulent" claims for payment. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696, 696. "Debates at the time [of the FCA's original passage] suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Neifert-White*, 390 U.S. at 232; *see also* Cong. Globe, 37th Cong., 3d Sess. 956 (statement of Sen. Wilson).

In 1942, Congress limited the *qui tam* provisions of the statute to exclude private lawsuits based on information in the government's possession. *See* S. Rep. No. 99-345, at 12 (1986), 1986 U.S.C.C.A.N. 5266, 5277. In 1986, however, Congress reversed course, in response to evidence that government fraud – and health-care fraud in particular – was "on a steady rise." *Id.* at 2, 1986 U.S.C.C.A.N. 5267.

Congress found that the U.S. Department of Health and Human Services ("HHS") "ha[d] nearly tripled the number of entitlement program fraud cases referred for prosecution" between 1983 and 1986. *Id.* Nevertheless, the majority of such fraud went undetected. *See id.* at 2-3, 1986 U.S.C.C.A.N. 5267-68. Congress sought to strengthen the FCA as "the Government's primary litigative tool for combatting fraud" and to "make the statute a more useful tool against fraud in modern times." *Id.* at 2, 1986 U.S.C.C.A.N. 5266; *see also* H.R. Rep. No. 99-660, at 18 (1986) (stating FCA "is used as the primary vehicle by the Government for recouping losses suffered through fraud" and thus deeming it "important that it be an effective tool for recouping these losses").

In 2009, Congress declared the reinvigorated FCA "[o]ne of the most successful tools for combating waste and abuse in Government spending." S. Rep. No. 111-10, at 10 (2009), 2009 U.S.C.C.A.N. 430, 437. It enacted the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, to "broaden the coverage" of the FCA against "fraud affecting . . . federal assistance and relief programs," S. Rep. No. 111-10, at 16, 2009 U.S.C.C.A.N. 442, by abrogating "several court decisions" that had "limited the reach of the False Claims Act," "derailed meritorious actions," and thus "jeopardiz[ed] billions in Federal funds," H.R. Rep. No. 111-97, at 2, 5 (2009); *see* S. Rep. No. 111-10, at 10, 2009 U.S.C.C.A.N. 437-38.

In its current form, the FCA prohibits "any person" from (among other things) "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). The Act defines a "claim" to include

"any request or demand . . . for money or property" that is "presented to an officer, employee, or agent of the United States." *Id.* § 3729(b)(2)(A)(i). Knowledge includes both "actual knowledge" of the false or fraudulent nature of the claim, or "deliberate ignorance" or "reckless disregard" of the claim's "truth or falsity." *Id.* § 3729(b)(1)(A)(i)-(iii).

2. Medicaid is a joint federal-state program that provides health insurance for the poor and disabled. *See* 42 U.S.C. § 1396 *et seq.* States administer their own Medicaid programs according to a state plan approved by HHS. *See id.* § 1396a; *see also* 42 C.F.R. §§ 430.10-430.25. Pursuant to those plans, state Medicaid agencies pay health-care providers' claims for services rendered to Medicaid recipients, but are reimbursed for a significant portion of those funds through federal grants. *See* 42 C.F.R. § 430.0. As a result, it is undisputed that claims to MassHealth implicate liability under both the federal FCA and Massachusetts' FCA. *See* 42 U.S.C. § 1396b; *see also United States v. Rogan*, 459 F. Supp. 2d 692, 717 (N.D. Ill. 2006), *aff'd*, 517 F.3d 449 (7th Cir. 2008).[1]

3. Federal and state spending on health-care programs continues to grow rapidly, driven by an aging population and rising health-care costs. In 2014, Medicare expenditures totaled nearly $620 billion; Medicaid expenditures totaled nearly $500 billion, with state and local governments contributing nearly $200 billion.[2] Together, those programs

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[1] Because respondents' state-law FCA claims are not at issue in this Court, we refer only to the federal FCA.

[2] *See* Centers for Medicare & Medicaid Services, NHE Fact Sheet ("CMS Fact Sheet"), https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (last visited Feb. 19, 2016).

cover nearly one-third of all Americans.[3] Health-care spending in 2014 represented approximately 17.5% of the country's total gross domestic product.[4] In Massachusetts, the State's share of Medicaid spending totaled approximately 23% of the State's budget.[5]

Notwithstanding Congress's bolstering of the FCA, health-care fraud remains rampant.[6] A "staggering . . . 10 percent of the federal health care budget" is "lost to fraud" yearly.[7] The Department of Justice's ("DOJ") FCA cases have recouped only a tiny fraction of those losses: $1.9 billion in health-care fraud recoveries in 2015, and $16.5 billion over seven years (2009-2015).[8]

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[3] *See* U.S. Census Bureau, Random Samplings – Medicare and Medicaid, Age and Income, http://blogs.census.gov/2013/09/17/medicare-and-medicaid-age-and-income-2/ (last visited Feb. 19, 2016).

[4] *See* Eric Planin, *US Health Care Costs Surge to 17 Percent of GDP*, FiscalTimes.com (Dec. 3, 2015), http://www.thefiscaltimes.com/2015/12/03/Federal-Health-Care-Costs-Surge-17-Percent-GDP.

[5] *See* Massachusetts Medicaid Policy Inst. & Massachusetts Budget & Policy Ctr., *Understanding the Actual Cost of MassHealth to the State* (Nov. 2014), http://massbudget.org/reports/pdf/NetCost-MassHealth_FINAL.pdf.

[6] *See* GAO Report to Congressional Committees, *High-Risk Series: An Update* 1, 342-84 (Feb. 2015), http://www.gao.gov/assets/670/668415.pdf.

[7] Joan H. Krause, *A Conceptual Model of Health Care Fraud Enforcement*, 12 J.L. & Pol'y 55, 55 (2003); *see* National Health Care Anti-Fraud Ass'n, *Combating Health Care Fraud in a Post-Reform World: Seven Guiding Principles for Policymakers* 3 (Oct. 6, 2010) (estimating $70-$234 billion in fraud losses), http://www.nhcaa.org/media/5994/whitepaper_oct10.pdf.

[8] *See* DOJ, Press Release, *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015*

B. MassHealth's Provider Regulations For Mental Health Centers

Chapter 429.000 of MassHealth's provider regulations requires that mental health centers provide quality psychiatric care using properly trained mental health professionals and adequately supervised staff. *See* 130 Mass. Code Regs. § 429.401 (setting forth requirements that "[a]ll mental health centers participating in MassHealth must comply with"). That chapter governs both "parent centers," which are defined as "the central location of the mental health center," *id.* § 429.402, and "satellite facilities" like petitioner's Arbour facility, which is "a mental health center program at a different location from the parent center that operates under the license of and falls under the fiscal, administrative, and personnel management of the parent center," *id.*[9]

Section 429.422(A) provides that the mental health center must have at least one psychiatrist "who meet[s] the qualifications outlined in 130 CMR

(Dec. 3, 2015) ("DOJ Press Release"), http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

Likewise, the estimated $42 billion in annual federal procurement fraud losses, *see* Office of Inspector General, U.S. Dep't of Defense, *The "Science" of Procurement Fraud* at 1, http://www.dodig.mil/iginformation/archives/finalwebsnips.pdf, dwarfs DOJ's recoveries, *see* DOJ Press Release ($1.1 billion in 2015). The federal government also suffers significant fraud losses in a wide range of insurance, grant, and assistance programs. *See id.*

[9] "Autonomous" satellites have "sufficient staff and services to substantially assume [their] own clinical management," whereas "dependent" satellites operate "under the direct clinical management of the parent center." 130 Mass. Code Regs. § 429.402.

429.424." *Id.* § 429.422(A). Under § 429.424, that psychiatrist "must either currently be certified by the American Board of Psychiatry and Neurology, or the American Osteopathic Board of Neurology and Psychiatry, be eligible and applying for such certification." *Id.* § 429.424(A)(1).

As for social workers, "[a]t least one staff social worker must have received a master's degree in social work from an accredited educational institution and must have had at least two years of full-time supervised clinical experience subsequent to obtaining a master's degree." *Id.* § 429.424(C)(1). "Any additional social workers on the staff must provide services under the direct and continuous supervision of an independent clinical social worker." *Id.* § 429.424(C)(2). Likewise, "[a]ll unlicensed counselors . . . must be under the direct and continuous supervision of a fully qualified professional staff member." *Id.* § 429.424(F)(1).

Two MassHealth regulations expressly state that adequate supervision and proper licensure are conditions of Medicaid payment. First, § 429.439 states that a satellite facility's clinical director must "meet all of the requirements in 130 CMR 429.423(B)." *Id.* § 429.439(C). Section 429.423(B), in turn, contains a list of "specific responsibilities of the clinical director," including the "overall supervision of staff performance" and "accountability for employing adequate psychiatric staff." *Id.* § 429.423(B)(2)(c), (e). Section 429.439 expressly provides that satisfaction of these responsibilities is a prerequisite to payment under Medicaid: "Services provided by a satellite program are reimbursable only if the program meets the standards described below [in subsections (A) through (D)]." *Id.* § 429.439.

Second, § 429.441 states: "The MassHealth agency pays for diagnostic and treatment services only when a professional staff member, as defined by 130 CMR 429.424, personally provides these services to the member or the member's family, or personally consults with a professional outside of the center." *Id.* § 429.441(A); *see* Pet. Br. 8 (acknowledging § 429.441 creates express payment condition). Section 429.424, as explained above, delineates the licensing and supervision prerequisites for eligibility to provide billable services to MassHealth.

In addition, other Chapter 429.000 regulations reiterate the requirement that mental health facilities use qualified and properly supervised staff. Section 429.421(A)(2) provides that "[a]ll services must be . . . delivered by qualified staff in accordance with 130 CMR 429.424." 130 Mass. Code Regs. § 429.421(A)(2). Section 429.438(E) provides that mental health centers must supervise staff members "within the context of a formalized relationship," and such supervision must be "appropriate to the person's skills and level of professional development" and consistent with applicable professional licensing standards. *Id.* § 429.438(E)(1)-(2). And MassHealth regulations state expressly that Medicaid payment for mental health services includes payment for supervision. *See id.* § 429.408(C).

Massachusetts' Department of Public Health ("DPH"), which licenses and regulates mental health facilities, *see* 105 Mass. Code Regs. §§ 140.500-140.560, also emphasizes the critical importance of appropriate staff supervision. DPH regulations provide that case consultation, psychotherapy, and counseling services provided at such clinics must be supervised "by the mental health professionals iden-

tified in 105 CMR 140.530(C)." *Id.* § 140.520(D)(1). Section 140.530(C), in turn, requires that every satellite facility must have a board-certified or board-eligible psychiatrist on staff. *Id.* § 140.530(C)(1)(a); *see id.* § 140.330 ("A satellite clinic must meet, independently of its parent clinic, all the requirements imposed on clinics by 105 CMR 140.000 [with exceptions not relevant here]."). Section 140.530(E) further provides that unlicensed staff members "must be clinically supervised on a regular basis by professional staff members as defined in 105 CMR 140.530(C)" and that documentation of such supervision must be made available for review. *Id.* § 140.530(E).

C. Factual Background

1. This case arises out of petitioner Universal Health Services, Inc.'s ("UHS") provision of mental health services to a MassHealth beneficiary, Yarushka Rivera, a 17-year-old girl and a special-needs student, at UHS's Arbour satellite facility in Lawrence, Massachusetts. 1JA16 (Compl. ¶¶ 21-23); 2JA37. In November 2007, Yarushka sought psychotherapy treatment at Arbour after experiencing behavioral difficulties at school. 1JA16, 18 (Compl. ¶¶ 24-25, 37-40); 2JA37. Throughout her treatment at Arbour, UHS billed Medicaid for – and was reimbursed for – its provision of clinical evaluation, psychotherapy, and preventive medication counseling services to Yarushka. 1JA18-19, 20, 22, 27 (Compl. ¶¶ 40-49, 58-62, 72-76, 110).

Yarushka was initially treated by two Arbour counselors: Maria Pereyra and Diana Casado. 1JA17, 19 (Compl. ¶¶ 28, 51). As respondents later learned, neither counselor had been licensed to perform psychotherapy treatment. *See infra* p. 13.

After several sessions with both counselors, Yarushka complained that she was not benefitting from these services and, in fact, that the counseling left her feeling angry, neglected, and rejected. 2JA102. However, when respondents (Yarushka's parents) relayed these complaints to Edward Keohan, a social worker and Arbour's clinical director, he was unfamiliar with Yarushka's treatment. 1JA17, 20 (Compl. ¶¶ 32, 34, 56). Suspecting that Pereyra and Casado were providing inadequate and unsupervised care to Yarushka, respondents asked Keohan to transfer her treatment to another counselor. *Id.* (Compl. ¶¶ 34, 56-57).

In February 2009, Keohan told respondents he would assign their daughter to a very experienced "doctor" named Anna Fuchu. 1JA21 (Compl. ¶ 64). Keohan told them (falsely, it turned out, *see infra* p. 13) that Fuchu was a licensed psychologist with a Ph.D. 2JA138. Fuchu likewise falsely held herself out as a psychologist and referred to herself as "Dr. Fuchu." 1JA21 (Compl. ¶¶ 65-66); *see* 2JA92, 203.

After a brief initial consultation, and despite having no license to perform psychotherapy treatment, Fuchu diagnosed Yarushka with bipolar disorder. 2JA67; 1JA21-22 (Compl. ¶¶ 70-71). Nevertheless, Yarushka's behavioral health continued to deteriorate under Fuchu's care. 1JA23 (Compl. ¶¶ 79-80). Respondents asked Fuchu to recommend a psychiatrist, and Fuchu referred Yarushka to Arbour staff member Maribel Ortiz. *Id.* (Compl. ¶¶ 81-83).

Ortiz introduced herself to Yarushka and her mother (respondent Correa) as a medical doctor and psychiatrist. 2JA117. In May 2009, Ortiz prescribed Trileptal to Yarushka based on Fuchu's bipolar disorder diagnosis. 1JA23 (Compl. ¶ 85). The Food and

Drug Administration ("FDA") has never approved Trileptal to treat bipolar disorder, only to treat partial seizures. *See* Trileptal Medication Guide, http://www.fda.gov/downloads/Drugs/DrugSafety/UCM246799.pdf.

Within a day after taking Trileptal, Yarushka experienced dizziness, headaches, and swelling in her eyes. 2JA96. Yarushka repeatedly called Ortiz and left messages describing the medication's side effects. 2JA117-18. Ortiz, believing that Yarushka was merely suffering from a "case of the red eyes," chose not to return her calls. 2JA107.

Due to the side effects' severity, and because she had not heard otherwise from Ortiz, Yarushka stopped using Trileptal. 2JA118. Ortiz never advised Yarushka not to stop taking Trileptal without first consulting her, and never disclosed that suddenly stopping Trileptal has been shown to create significant seizure risks. 2JA118-19; 1JA25 (Compl. ¶ 94). Days later, Yarushka, who had no seizure history, suffered a massive seizure, requiring hospitalization. 2JA118, 120.

After Yarushka's release, respondent Escobar called Arbour and spoke with an employee who claimed to be Ortiz's supervisor. That employee informed Escobar that Ortiz was, in fact, a nurse and not a doctor. 1JA25 (Compl. ¶¶ 97-100). The following day, Escobar called Keohan and complained about Ortiz's treatment of Yarushka. 1JA25-26 (Compl. ¶¶ 101-103). In response, Keohan told him that Ortiz was a nurse who was very young, inexperienced, and "still trying to get her feet wet." 2JA119.

Thereafter, Yarushka resumed her counseling with Fuchu and continued to receive treatment at Arbour

over the summer and into the fall of 2009. 1JA27 (Compl. ¶ 113). In October 2009 – while she was alone in her bedroom – Yarushka suffered a fatal seizure and died. 2JA119.

2. Yarushka's death precipitated respondents' investigation of the Arbour facility. 2JA119. Respondents learned that Arbour systematically had failed to employ professional staff members with the appropriate supervision and qualifications to render effective and quality care to MassHealth beneficiaries such as Yarushka. For example, Pereyra, Casado, and Fuchu never had been licensed to perform psychotherapy treatment. Fuchu's psychology degree came from an online school that the Massachusetts Board of Licensure did not recognize, and the Massachusetts Board of Registration of Psychologists had refused to license her. 1JA21, 28 (Compl. ¶¶ 67-68, 120). Respondents further discovered that Ortiz had been acting without supervision when she had prescribed Trileptal to Yarushka. 1JA24 (Compl. ¶ 87).

Respondents also learned that numerous other UHS employees at Arbour had falsely identified themselves to the federal Centers for Medicare and Medicaid Services ("CMS") as licensed social workers or licensed mental health counselors in obtaining National Provider Identification numbers. 1JA35-36 (Compl. ¶¶ 154-156). In fact, many of these employees were not licensed to practice social work or provide psychotherapy at all. 1JA36 (Compl. ¶¶ 155-156).

Respondents filed complaints with a number of Massachusetts state agencies, including the Division of Professional Licensure ("DPL") and DPH. 1JA30, 31 (Compl. ¶¶ 134, 137). The Massachusetts Board

of Registration of Social Workers, which is part of DPL, concluded that Keohan had "authorized" Pereyra to practice social work while unlicensed, in violation of state law. 2JA198. And in a consent agreement with the Massachusetts Board of Registration of Psychologists, which is also part of DPL, Fuchu likewise admitted that she had illegally practiced as a psychologist without a license. 2JA203-04.

Respondents' complaint spurred DPH's own independent investigation. 2JA208. In April 2012, DPH found that Arbour employed at least 23 unlicensed mental health counselors who had provided mental health therapy without supervision – at least one of whom had been providing such services since 1996. 2JA223-24. Keohan admitted to DPH that, until recently, he had been entirely "unaware that supervision was required to be provided on a regular and ongoing basis." 2JA223. DPH also determined that UHS had failed adequately to staff the Arbour clinic with a board-certified or board-eligible psychiatrist, as required by Massachusetts law, because Maria Gaticales, the clinic's sole physician, had failed the board-certification examination 20 years earlier. 2JA219-20.

3. Investigations in other States prompted by UHS whistleblowers have revealed similar false and fraudulent billing practices at other UHS facilities. In *United States ex rel. Johnson v. Universal Health Services, Inc., et al.*, No. 1:07-cv-00054 (W.D. Va.), DOJ and the Commonwealth of Virginia brought an FCA suit alleging that UHS and its subsidiaries knowingly presented claims to Medicaid that "falsely or fraudulently made it appear that treatment and treatment planning was provided under the direction of a licensed psychiatrist when, in fact, neither active

treatment nor physician supervision was provided." Am. Compl. ¶¶ 18, 20-21, 2010 WL 4902643 (W.D. Va. filed Nov. 24, 2010). In 2012, UHS and its subsidiaries agreed to pay $6.85 million to settle these claims. *See* DOJ, Press Release, *Residential Youth Treatment Facility for Medicaid Recipients in Marion, Virginia Agrees to Resolve False Claims Act Allegations* (Mar. 28, 2012), http://www.justice.gov/opa/pr/residential-youth-treatment-facility-medicaid-recipients-marion-virginia-agrees-resolve-false.

Likewise, in 2009, the parent of an autistic child and former UHS staff members filed a *qui tam* complaint in California, alleging that UHS had engaged in a pattern or practice of employing non-credentialed and improperly credentialed individuals as teachers at its special education schools and improperly charging public school districts for the provision of special education services at these schools. *See* Compl. ¶¶ 18-22, *Martin v. UHS of Delaware, Inc.*, No. 34-2009-00044335 (Cal. Super. Ct. filed May 19, 2009). In 2012, UHS settled the case with the plaintiffs and the California Attorney General for $4.25 million. *See* Stipulation and Order Approving Settlement and Dismissal of False Claims Complaint, *Martin v. UHS of Delaware, Inc.*, No. 34-2009-00044335 (Cal. Super. Ct. Aug. 9, 2012), http://uhsbehindcloseddoors.org/wp-content/uploads/2014/04/CA-Sac-2009-Martin-v.-UHS-of-Delaware-Settlement-order.pdf.

D. Proceedings Below

1. In July 2011, respondents filed a *qui tam* action against UHS under the federal and Massachusetts FCAs, 31 U.S.C. § 3729 *et seq.*, and Mass. Gen. Laws ch. 12, § 5A *et seq.* Respondents' Second Amended Complaint, filed in 2013, claimed that

UHS's invoices to MassHealth for Yarushka's treatment were "false or fraudulent" because (1) UHS knew it was in violation of state regulations requiring proper supervision of clinical mental health staff, 1JA44-52, 59-67 (Compl. ¶¶ 198-251, 293-343) (Counts 1-4, 8-11); and (2) UHS knew it was in violation of state regulations requiring that Arbour employ at least one board-certified psychiatrist at all times, 1JA56-59, 71-74 (Compl. ¶¶ 276-292, 364-378) (Counts 7, 14). Respondents' complaint alleged that Dr. Gaticales, "[t]he only psychiatrist employed by Arbour," was neither "board certified in psychiatry" nor "board eligible." 1JA24, 26, 41, 57 (¶¶ 87, 108-109, 185, 280). The complaint also alleged "false or fraudulent" claims by UHS unlicensed and unsupervised clinical staff at other UHS facilities. 1JA52-56, 68-71 (Compl. ¶¶ 252-275, 344-363) (Counts 5-6, 12-13).

2. The district court dismissed the complaint for failure to state a claim. It acknowledged that, under First Circuit precedent, submitting a claim to MassHealth in knowing violation of a material condition of payment constituted a "false or fraudulent claim" under the FCA. App. 37-38. It also recognized that a requirement "need not expressly state that it is a condition of payment in order to lay the foundation for FCA liability." App. 38. However, it concluded that the regulations UHS allegedly violated could not trigger FCA liability because they were conditions of participation rather than conditions of payment. App. 36 (concluding this distinction survived under First Circuit law).

The district court acknowledged that § 429.439 was a condition of payment. App. 43; *see supra* p. 8. But it held that respondents had not sufficiently pleaded

violations of that regulation. The court read § 429.439(C) as merely governing the "relationship" between a parent and a satellite facility, and asserted that the complaint contained no allegations concerning the parent-satellite relationship. App. 43-44.

3. The First Circuit reversed. App. 1-24. The court held that FCA liability can be established if "the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." App. 13 (citing *New York v. Amgen Inc.*, 652 F.3d 103, 110 (1st Cir. 2011)). Those preconditions of payment "need not be 'expressly designated'" as long as they are material to the government's payment decision. *Id.* (quoting *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387-88 (1st Cir. 2011)).

The appeals court then concluded respondents' complaint stated a claim under that standard. As to respondents' claim based on failure to supervise, the First Circuit noted that § 429.439(C), which is an express condition of MassHealth payment, "specifies that the clinical director of [satellite facilities] must 'meet all of the requirements in 130 CMR 429.423(B).'" App. 16. The court also determined that § 429.423(B)'s requirement that the satellite's clinical director ensure "overall supervision of staff performance" "makes plain" that reimbursement is conditioned upon fulfillment of that responsibility. *Id.* The court observed that this condition of payment was confirmed by the fact that "the cost of staff supervision is automatically built into MassHealth reimbursement rates." *Id.* (citing 130 Mass. Code Regs. § 429.408(C)(3)).

Given that the crux of respondents' complaint was that "supervision at Arbour was either grossly

inadequate or entirely lacking," *id.*, the First Circuit found respondents had sufficiently pleaded that UHS's claims for payment for the services provided to Yarushka by Pereyra, Casado, Fuchu, and Ortiz were false or fraudulent "in that they misrepresented compliance with a condition of payment, i.e., proper supervision," App. 17. The court also concluded that the complaint adequately pleaded that appropriate supervision was material to the government, App. 18, and that respondents had adequately pleaded knowledge, citing Keohan's admission in an interview with Massachusetts DPH that he had been "unaware that supervision was required to be provided on a regular and ongoing bas[i]s," *id.*[10]

The First Circuit also reversed the dismissal of respondents' claims pertaining to UHS's failure to employ at least one board-certified or board-eligible psychiatrist. App. 20-22 (citing 130 Mass. Code Regs. § 429.422(A); 105 Mass. Code Regs. § 140.530(C)(1)(a)). Because § 429.423(B) explicitly requires the facility's clinical director to be responsible for "employing adequate psychiatric staff," 130 Mass. Code Regs. § 429.423(B)(2)(e), "Arbour's failure to maintain a properly licensed psychiatrist on staff constituted noncompliance with a material condition of payment." App. 21-22. The court further found that UHS's violations were "at least deliberately ignorant," because respondents had been able to determine that Gaticales was not board-certified merely by referring to a public licensing database. App. 22.

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[10] The First Circuit's holdings that respondents adequately pleaded that the regulations are "material" and UHS's conduct was "knowing" are not before the Court because petitioner did not seek certiorari on those issues.

Finally, the First Circuit reversed the dismissal of respondents' claims that UHS violated the federal and Massachusetts FCAs in billing for services provided by other unlicensed and unsupervised therapists and nurse practitioners. App. 22-23. The court concluded that respondents' complaint had satisfied Federal Rule of Civil Procedure 9(b) by alleging that (1) 22 unlicensed UHS employees used National Provider Identification numbers; (2) DPH had confirmed that, as of January 2012, 23 unlicensed UHS therapists practiced without supervision; and (3) Keohan had admitted that the Lawrence clinic "suffered from a fundamental lack of oversight." App. 23.

SUMMARY OF ARGUMENT

I.A. The FCA provision at issue here prohibits "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval." When a claimant asserts a right to government funds without disclosing that it has violated the government's material payment conditions, that claim is both "false" and "fraudulent," regardless of whether it contains an express false statement.

The ordinary meaning of a "claim" is an assertion of a legal right to government funds, which carries with it an implied representation that the claimant is legally entitled to payment. According to numerous pre-FCA dictionaries, a "false claim" is one that is "not well founded." Falsity in this context does not require an express false statement. A claim is "not well founded," and is therefore "false," when it asserts a right to government funds to which the contractor is not entitled because the goods or services fail to comply with the government's requirements.

Such a claim for payment is also "fraudulent." At common law, "fraud" encompasses deception through

omission of material facts. An assertion of a right to government funds made without disclosing the contractor's violation of the government's material conditions of payment is fraudulent by omission.

The FCA's structure confirms its plain meaning. A separate FCA provision prohibits the making or using of a "false record or statement" in connection with a "false or fraudulent claim." That provision makes clear that a false statement is not necessary to prove a "false or fraudulent claim."

B. Implied false certification liability is critical to the FCA's purposes. From its inception, the FCA was designed to reach all the possible tactics by which contractors might steal from the public fisc. In recognition of Congress's broad remedial purposes, this Court consistently has interpreted the FCA to reach all types of false or fraudulent attempts to cause the government to pay out money that is not due, not just explicit false statements.

Congress reaffirmed that core purpose when it modernized the FCA in 1986. The legislative reports accompanying those amendments confirm that false or fraudulent claims include claims for goods or services provided in violation of government specifications, and claims submitted by a claimant who is ineligible to participate in a government program.

C. Petitioner's policy arguments cannot justify engrafting a requirement that has no basis in the FCA's text and structure, and that directly contravenes Congress's core purposes. Implied false certification liability does not render express certifications of compliance surplusage because such certifications ease the plaintiff's burden of proof on the FCA's separate materiality element. Requiring express certifications is not necessary to provide adequate notice,

because the FCA's separate knowledge requirement protects contractors who commit good-faith mistakes.

II.A. The FCA's prohibition on "false or fraudulent claims" does not support petitioner's proposed express-designation requirement. Petitioner's effort to ground that limitation in the FCA's separate knowledge and materiality requirements is also unpersuasive. There simply is no textual basis for petitioner's rule.

B. An express-designation requirement would create a gaping loophole in FCA enforcement. Many if not most government requirements are obviously material conditions of payment because they affect the nature or quality of the goods or services delivered. Petitioner's rule would improperly immunize claims from FCA liability even when the claimant knows its goods or services fail to conform to such material requirements, simply because the requirement is not labeled a "condition of payment." This Court consistently has rejected such artificial restrictions on the FCA's reach.

C. Petitioner's policy arguments are again insufficient to justify an extra-textual limitation. Rigorous enforcement of the FCA's materiality and knowledge requirements has proved adequate to ensure that government contractors are not subject to FCA liability based on good-faith or trivial violations. Empirical data and experience refute petitioner's anecdotal claims of runaway liability under the implied certification theory.

III. The Court should reject petitioner's position on both questions presented and affirm. Even if the Court were to adopt an express-designation requirement, it should still affirm because the First Circuit correctly interpreted MassHealth's regulations as

expressly designating adequate supervision and board licensure conditions of payment under Medicaid. There is no basis for this Court to depart from its ordinary rule of deferring to the experience of the regional federal circuit in interpreting state law.

ARGUMENT

I. THE FALSE CLAIMS ACT PROHIBITS DEMANDING FUNDS TO WHICH THE CLAIMANT KNOWS IT IS NOT ENTITLED BECAUSE IT HAS VIOLATED THE GOVERNMENT'S PAYMENT CONDITIONS

A. The Submission Of Ineligible Claims For Payment Constitutes The Making Of "False Or Fraudulent Claims For Payment Or Approval"

1. Knowingly billing the government for services that fail to meet material conditions falls squarely within the scope of a "false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A).

a. That conclusion flows, first and foremost, from the FCA's plain language. *See Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008) ("[W]e start, as always, with the language of the statute.") (internal quotations omitted); *see also Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 408 (2011). As this Court long has held, the FCA's statutory prohibition against "false or fraudulent claims" "reach[es] all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *see also Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (noting Congress drafted the FCA "expansively"); *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001) (FCA is designed to prohibit any "improper

claim . . . aimed at extracting money [from] the government").

When a contractor asserts a claim to government funds, without disclosing that it has failed to satisfy requirements that are material to its entitlement to be paid, that "claim for payment or approval" falls within the plain meaning of both "false" and "fraudulent." A "claim" is an assertion of a legal right to government funds. *See* 31 U.S.C. § 3729(b)(2)(A) (defining "claim" as "request or demand . . . for money or property"); *Webster's Third New International Dictionary* 414 (1981) ("claim" is "a demand of a right or supposed right"; "a calling on another for something due or supposed to be due") ("*Webster's Third*"); *Hobbs v. McLean*, 117 U.S. 567, 575 (1886) ("What is a claim against the United States is well understood. It is a right to demand money from the United States."); *Black's Law Dictionary* 301 (10th ed. 2014) ("[t]he assertion of an existing right"; "[a] demand for money, property, or a legal remedy to which one asserts a right"). As such, making a claim carries with it an implied representation that the contractor is entitled to payment. As the 1828 version of Webster's *American Dictionary* states: "A claim implies a right or supposed right in the claimant to something which is in another's possession or power." Noah Webster, *An American Dictionary of the English Language* (1828) ("*Webster's 1828*").

The aptest definition of "false" in the context of a "claim" is "not well founded." *Webster's 1828* (defining "false" as "[n]ot well founded; as a *false* claim"); *see Webster's Third* 819 (same); *see also* 1 *A Popular and Complete English Dictionary* 520 (John Boag ed., 1848) ("Not well founded."). An invoice that asserts a right to payment even though the goods or services

provided fail to comply with material requirements is "not well founded," and therefore "false." *See also* Henry J. Holthouse, *A New Law Dictionary* 199 (1847) (noting definition of "false claim" in forestry law as "the claiming [of] more than one's due"); Alexander M. Burrill, *A Law Dictionary and Glossary* 601 (1867) (stating that a "false claim" is "where a man claimed more than his due"); *Black's Law Dictionary* 719 (noting 16th century definition of "false claim" as "[a]n assertion or statement that is untrue; esp., overbilling").

Several examples confirm that plain reading. If a company "contracts with the government to supply gasoline with an octane rating of ninety-one or higher" but "knowingly supplies gasoline that has an octane rating of only eighty-seven and fails to disclose this discrepancy to the government," the company's bill to the government "qualifies as a false claim under the FCA." *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) ("*SAIC*"). Likewise, if a contractor invoices the government for providing security guards for a military facility, knowing that the guards failed to satisfy contractually prescribed marksmanship requirements, those invoices are "false or fraudulent" because they seek to obtain funds to which the contractor is not entitled. *See United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636-37 (4th Cir. 2015), *petition for cert. pending*, No. 14-1440 (U.S. filed June 5, 2015). And if, as alleged in the complaint, UHS billed the government under Medicaid, knowing that its psychiatric services did not satisfy Mass-Health regulations requiring that care be provided by properly licensed and supervised medical staff, UHS submitted "false or fraudulent" claims under

the FCA. *See SAIC*, 626 F.3d at 1268-69 (FCA liability if a contractor "(1) knows that it violated a contractual requirement, (2) recognizes that compliance with that requirement is material to the government's decision to pay . . . , and (3) . . . know[s] that were the violation disclosed, no payment would be forthcoming").

b. Petitioner's argument rests on the premise (at 29) that a claim can be "false" only if it is "factually false" – that is, if it "incorrectly describe[s] the goods or services provided, or seek[s] reimbursement for goods or services that were not provided" – or if it contains an explicit false statement. That is incorrect as a matter of plain language: a claim can be "not well founded," and thus false, even without an express false statement. Indeed, petitioner can muster no support for its reading. The only case petitioner cites – the Second Circuit's decision in *Mikes v. Straus* – disagreed with petitioner's narrow reading and adopted the implied certification theory. *See* 274 F.3d at 696-97.[11]

Petitioner's argument also fails on its own terms: when a contractor demands money for goods or services that do not comply with the government's material requirements, such claims *do* "seek reimbursement for goods or services that were not provided." Pet. Br. 29. Eighty-seven octane gasoline is not the same as 91-octane gasoline and may cause

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[11] "Not well founded" is the best textual reading of "false" in the context of a "claim." *See supra* pp. 23-24. The next most relevant definition, recognized by *Mikes*, is "'not true,'" "'deceitful,'" and "'tending to mislead.'" 274 F.3d at 696 (quoting *Webster's Third* 819). Claims that assert a right to government funds to which the claimant is not entitled are also deceitful and misleading even in the absence of an express false certification. *See infra* pp. 27-29.

damage to an engine not designed for lower-grade gasoline. Military guards who cannot shoot straight are inferior to guards with marksmanship training. And psychiatric services provided by unlicensed and unsupervised staff are unsuitable compared to services provided by properly licensed and supervised professionals (and are potentially dangerous to the patient's health). Petitioner asserts (at 2) that "the implied-certification theory presumes that the government received the amount of goods or services it paid for." To the contrary, in each case above, the failure to abide by the government's material payment conditions makes the claims "false," even by petitioner's own definition, because the contractor did not provide the same goods or services the government agreed to purchase.

2. A claim for payment is "fraudulent" when it contains an affirmative misrepresentation or nondisclosure that is deceptive or misleading. *See Webster's Third* 904 (defining "fraud"); *Webster's 1828* (defining "fraud" as "[d]eceit" or "deception," "either by stating falsehoods, or suppressing truth"). Because a claim implies a right to the funds demanded, *see supra* p. 23, a claim made without disclosing that the contractor is in violation of material conditions of payment "rests on a false representation of compliance" with the government's payment conditions. *SAIC*, 626 F.3d at 1266. Virtually every court of appeals has correctly recognized that straightforward principle.[12]

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[12] *See SAIC*, 626 F.3d at 1266; *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 379 (1st Cir. 2011); *Mikes*, 274 F.3d at 700; *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306-07 (3d Cir. 2011); *Triple Canopy*, 775 F.3d at 636; *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002);

Petitioner contends (at 30-33) that implied certification liability is inconsistent with common-law fraud principles. As an initial matter, however, the FCA does not embrace every element of common-law fraud. For example, the FCA does not require reliance, and its knowledge element "require[s] no proof of specific intent to defraud." 31 U.S.C. § 3729(b)(1)(B). Nor does the FCA require proof of damages: a person who presents a "false or fraudulent claim" is liable even if the claim is not paid. *See, e.g., United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009) (noting that FCA "*protects* the Treasury from monetary injury"). It thus would be inappropriate to invoke any limitations of common-law fraud to restrict the FCA.

In all events, implied false certification is consistent with common-law fraud, which was not

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Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1218 (10th Cir. 2008); *McNutt ex rel. United States v. Hayleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005).

Petitioner repeatedly relies on the Fifth Circuit's decision in *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) ("*Steury I*"), but that decision expressly reserved judgment on the implied false certification theory. *See id.* at 268 (court "need not resolve" viability of implied false certification "because in any event the factual allegations in Steury's amended complaint provide no basis for implying a false certification"); *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 206 (5th Cir. 2013) (per curiam) ("*Steury II*") ("*Steury I* did not reject the implied false certification theory of FCA liability."). The only circuit to reject implied false certification mistakenly believed *Steury* had done so, and it offered no independent analysis for its conclusion. *See United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711-12 (7th Cir. 2015), *petition for cert. pending*, No. 15-729 (U.S. filed Dec. 2, 2015).

limited to affirmative false statements, but also included omission of material facts. *See Neder v. United States*, 527 U.S. 1, 22 (1999) (common-law fraud included both "misrepresentation or concealment of material fact") (emphasis omitted); *accord Durland v. United States*, 161 U.S. 308, 312-13 (1896) (distinguishing "false pretenses," which requires misrepresentation of an existing fact, and a "scheme or artifice to defraud," which encompasses "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future").

Petitioner erroneously contends that government contractors have no duty to disclose that they have failed to comply with the government's conditions of payment. First, because a "claim for payment or approval" constitutes an assertion of a legal right to government funds, *see supra* p. 23, it conveys an "implied certification" that the contractor has supplied the goods or services for which payment is sought in compliance with the government's requirements. *SAIC*, 626 F.3d at 1266; *see* App. 17 n.14 (holding that demand for payment "implicitly communicate[s] that [the claimant] ha[s] conformed to the relevant program requirements"). If, in fact, that is not true, a contractor's omission of its failure to abide by the government's requirements is misleading. *See also* Restatement (Second) of Torts § 529 (1977) ("A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to

state additional or qualifying matter is a fraudulent misrepresentation."); *accord id.* § 551(2)(b).[13]

Second, petitioner is incorrect that government contractors have no legal duty to inform the government of undisclosed defects in the goods or services they provide. A duty to disclose such defects existed at common law, as pre-Civil War fraud cases held. *See, e.g., Paddock v. Strobridge*, 29 Vt. (3 Williams) 470, 480 (1857) ("There can be no doubt if the seller is aware of the deception and the buyer is ignorant; such deceit will form the basis of an action [for fraud or deceit] at law, although no representation is made."); *Singleton's Adm'r v. Kennedy*, 48 Ky. (9 B. Mon.) 222, 225 (1848) ("[t]he practice of so putting up goods . . . as to present a favorable exterior, not truly representing the interior, is fraudulent"; "[i]t is the duty of a vendor to disclose any defect in the article which he is vending, unless it be palpable to the purchaser"). Indeed, it would be quite odd to suppose that the very problems encountered in the Civil War that gave rise to the FCA – defective cannons and rifles and other war materiel – somehow were *not* false or fraudulent claims when the contractors

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[13] Petitioner's analogy (at 30) to a bank check drawn on an account with insufficient funds is flawed for two reasons. First, although this Court held check kiting not to contain a "false statement or report" under 18 U.S.C. § 1014, *see Williams v. United States*, 458 U.S. 279, 284-85 (1982), several courts have held that check kiting does violate the FCA, which extends beyond false statements of fact. *See Scolnick v. United States*, 331 F.2d 598, 599 (1st Cir. 1964) (per curiam); *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983). Second, even if *Williams*'s interpretation of § 1014 extended to the FCA, its rationale – that a bank check does not represent that the funds are available – is inapplicable to a claim for payment, which implies a right to the demanded funds. *See supra* p. 23.

supplying the government knew they did not meet the required standards.

Third, the duty to disclose is critical when private parties contract with the government. As Justice Holmes observed, citizens must "turn square corners when they deal with the Government." *Rock Island, A. & L.R.R. Co. v. United States*, 254 U.S. 141, 143 (1920); *see* Michael Holt & Gregory Klass, *Implied Certification Under the False Claims Act*, 41 Pub. Cont. L.J. 1, 46 (2011) ("[C]ontracting with the Government is different, that it imposes heightened ethical obligations not to take advantage of the other side."). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; [petitioner] could expect no less than to be held to the most demanding standards in its quest for public funds." *Heckler v. Community Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984). Implied certification liability properly gives effect to the government's legitimate expectation that a contractor that demands payment but has failed to satisfy its end of the bargain will disclose the fact of its noncompliance, so that the government can decide whether and to what extent to pay the claim.

The two cases petitioner cites (at 32) do not establish that "[t]he common law has never understood the act of seeking payment under a contract as giving rise to a duty of disclosure." They merely say that a failure to disclose a breach of contract, without more, does not constitute fraud. *See Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 423 (S.D.N.Y. 1992) (involving allegedly fraudulent trade confirmations); *Myklatun v. Flotek Indus., Inc.*, 734 F.3d 1230, 1235-

36 (10th Cir. 2013) (failure to disclose potential future breach of exclusive distributorship contract did not constitute fraud). They did not even rest on an allegedly fraudulent demand for payment.

Petitioner invokes (at 32) a third case – *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 507 S.E.2d 344, 345-46 (Va. 1998) – for the concern that not every breach of contract case should be an actionable fraud.[14] That concern is unwarranted here, however, because implied false certification liability requires more than an ordinary contract breach. It arises only when the contractor, knowing it is in breach of a material contract requirement, nonetheless bills the government for the full price.[15] Proscribing knowing overbilling of the government is not an "extraordinary result." Pet. Br. 33. It is central to the FCA's core purpose, as reflected by its text.

3. Petitioner's argument that a "false or fraudulent claim" must contain an express false statement is also inconsistent with the FCA's structure. The

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[14] *Richmond Metropolitan Authority* is inconsistent with petitioner's own position because it concluded that even *express* false certifications of compliance in the applications for payment did not constitute common-law fraud under Virginia law. 507 S.E.2d at 346-47.

[15] *United States v. Steffen*, 687 F.3d 1104 (8th Cir. 2012), is also inapposite. That case did not involve a claim for payment for goods or services rendered. Rather, it involved a draw on a bank against a secured loan. The court found under that case's particular facts that the draw did not "implicitly represent[] that all of the representations and warranties in the security and loan agreements were true and correct in all material respects." *Id.* at 1116-17. It noted, however, that other courts in other circumstances "have found a draw request sufficient to show a defendant's scheme to defraud." *Id.* at 1117.

FCA contains a separate liability provision that prohibits the making or using of a "false record or statement" in connection with asserting a "false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Liability under § 3729(a)(1)(B) requires *both* a "false record or statement" and a "false or fraudulent claim." Section 3729(a)(1)(A), by contrast, requires only the presentation of a "false or fraudulent claim," without the additional element of a "false record or statement." Thus, FCA liability under § 3729(a)(1)(A) "may arise even absent an affirmative or express false statement' by the government contractor." *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 532 (10th Cir. 2000).

B. Implied Certification Liability Is Consistent With The Purposes Of The FCA And The 1986 Amendments

Implied certification liability falls squarely within the FCA's plain text and structure, and the Court can decide the case on that basis alone. It is equally clear, moreover, that implied certification liability advances the core purpose of the original FCA and the 1986 amendments, which modernized the Act. "[B]y any ordinary standard the language of the Act is certainly comprehensive enough to achieve this purpose." *Neifert-White*, 390 U.S. at 233 (internal quotations omitted). Petitioner's position that the FCA is limited to outright lies cannot be squared with the statute's broad remedial objectives.

1. When Congress enacted the FCA, "[t]he government was [being] cheated without conscience in its purchases of military supplies." Homer C. Hockett, *Political and Social Growth of the American People 1492-1865*, at 759 (3d ed. 1940). Congress viewed the "plundering" of the government by

contractors as "one of the crying evils of the period." Cong. Globe, 37th Cong., 3d Sess. 955 (statement of Sen. Howard); *see also id.* at 952 (statement of Sen. Howard) (describing "frauds and corruptions practiced in obtaining pay from the Government" as a "great evil").

Unscrupulous contractors used myriad schemes, not just outright lies, to obtain government funds. Billing the government for inferior goods was one of the most prevalent tactics Congress faced. *See id.* at 955 (statement of Sen. Howard) (describing sale of "useless" weapons); Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards As Well As Punishment in Regulatory and Tort Law*, 51 Harv. J. Legis. 315, 339 (2014) (providing examples of Civil War contractor fraud, including sale of "decrepit horses" and "rancid rations"). Congress thus promised "certain and speedy punishment" to individuals "who have failed to perform their duties in the execution of contracts made with the Government." Cong. Globe, 37th Cong., 3d Sess. 956 (statement of Sen. Davis).

From its inception, Congress intended the FCA to prohibit all the possible tactics by which contractors might steal from the public fisc. The prohibition of "false or fraudulent claims," in particular, was meant as strong prophylactic medicine. *See Neifert-White*, 390 U.S. at 233 (noting FCA's broad remedial purposes and adopting a broad reading of "claim" to include a loan application). Rather than having to prove that the contractor actually obtained money through fraud, Congress imposed civil penalties for attempting to obtain those funds through a "false or fraudulent claim." In short, Congress wanted to protect the public fisc *before* it was depleted.

Recognizing Congress's broad remedial purposes, this Court's decisions long have held that the FCA reaches all types of false or fraudulent claims, not just explicit falsehoods. *See id.* at 232 (holding FCA was intended to reach "all types of fraud, without qualification, that might result in financial loss to the Government"); *see also Rainwater v. United States*, 356 U.S. 590, 592 (1958) (FCA's purpose was "broadly to protect the funds and property of the Government from fraudulent claims").

In *United States v. Bornstein*, 423 U.S. 303 (1976), for example, the government agreed to purchase radio kits with certain specifications from a prime contractor (Model). *See id.* at 307. Model subcontracted the manufacturing of the electron tubes to a subcontractor (United). United sent Model falsely branded electron tubes that did not meet the government's specifications, and Model then unwittingly incorporated those tubes into the radio kits and invoiced the government. Model's claims were not false because of any express certification of compliance with the electron-tube specifications. Nor, contrary to petitioner's suggestion (at 37), did Model (which was unaware of United's false branding) "actively conceal" its noncompliance. Model's claims were false because they billed the government for goods and services that did not meet the government's specifications, and United was therefore subject to penalties for knowingly causing the submission of those claims. *See* 423 U.S. at 311 ("Model was not caused to file a false claim until it received shipments of falsely branded tubes from United.").

Likewise, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), electrical contractors obtained contracts funded by the federal Public Works Admin-

istration ("PWA") through collusive bidding. After winning the bids, the contractors sent monthly estimates to obtain progress payments. The Court had no difficulty holding that those estimates constituted "false or fraudulent" claims because they were "taint[ed]" by the bid-rigging and thus caused the federal government to pay inflated prices. *Id.* at 543. What made the claims actionable were the fraudulent bids that induced the government to enter into the contract, not any express false certification in the actual claims (i.e., the estimates). *See id.*[16]

2. Implied false certification also advances the 1986 amendments' objective "to make the False Claims Act a more effective weapon against Government fraud," S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. 5269. When Congress "moderniz[ed]" the FCA in 1986, health-care fraud had become a major drain on public resources. *See supra* pp. 3-4. Recognizing that the FCA "is a much more powerful tool in deterring fraud" than common-law remedies, S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. 5269, Congress reaffirmed the Act's core purpose to capture all types of fraudulent schemes that threaten the government fisc, including the knowing provision of nonconforming goods and services.

The Senate Judiciary Committee report accompanying the 1986 amendments expressly noted that a false or fraudulent claim under the FCA "may take many forms, the most common being a claim

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[16] While some contractors' bids certified they were "'genuine and not sham or collusive,'" not all did. 317 U.S. at 543. And all contractors submitted their monthly estimates on PWA Form I-23, which did not contain that certification. *See United States ex rel. Marcus v. Hess*, 41 F. Supp. 197, 206 (W.D. Pa. 1941), *rev'd*, 127 F.2d 233 (2d Cir. 1942), *rev'd*, 317 U.S. 537 (1943).

for goods or services not provided, *or provided in violation of contract terms, specification, statute, or regulation.*" *Id.* at 9, 1986 U.S.C.C.A.N. 5274 (emphasis added). Moreover, it reaffirmed that, because "[t]he False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay [out] sums of money," a claim "may be false *even though the services are provided as claimed* if, for example, the claimant is ineligible to participate in [a government] program." *Id.* Given this legislative record, rejecting FCA liability where a contractor knowingly withholds "information about its non-compliance with material contractual requirements" would "foreclose FCA liability in situations that Congress intended to fall within the Act's scope" and improperly "create . . . a counterintuitive gap in the FCA." *SAIC*, 626 F.3d at 1268-69.

Petitioner (at 35-36) argues that the 1986 Senate Report embraced liability only in situations where the contractor has made an express false certification regarding its compliance with applicable contract terms, statutes, or regulations. But that limitation is incompatible with the 1986 Senate Report's language. Moreover, as explained above (at 33), a core purpose of the original FCA was to prohibit billing the government for goods or services provided in violation of the government's specifications. It is implausible that, in strengthening the Act, Congress intended dramatically to curtail its reach. Indeed, on petitioner's reading of the 1986 Senate Report, the 1986 amendments arguably abrogated *Bornstein* and *Hess*. That simply is not a credible reading of Congress's objectives.

Petitioner also incorrectly contends (at 37) that none of the cases cited in the 1986 Senate Report

endorses implied false certification. The report features *Bornstein*, which embraced implied false certification. *See supra* p. 34. The report also cites *Henry v. United States*, 424 F.2d 677 (5th Cir. 1970), which falls squarely within the implied certification doctrine. In *Henry*, the government contracted with the defendant for the supply of pine oil disinfectant, which was to contain specified minimum amounts of pine oil and maximum amounts of moisture. *See id.* at 678. The contractor delivered disinfectant that did not meet these requirements, but it nonetheless submitted invoices for full payment. *See id.* Although the invoices contained no express certification regarding the disinfectant's pine oil or moisture content, the Fifth Circuit held that these invoices constituted false or fraudulent claims. *See id. Henry* thus supports the implied false certification theory.

Petitioner tries (at 37) to dismiss *Henry* as a "worthless goods or services" case, but in fact the government used some of the disinfectant, and its damages were reduced by the value of the amount used. *See* 424 F.2d at 578. Moreover, the FCA nowhere distinguishes worthless goods from nonconforming goods. Petitioner is certainly not well placed to defend its claims for full government reimbursement for services from unlicensed and unsupervised mental health providers who provided gravely deficient care. Indeed, petitioner's distinction cannot be squared with the Act's plain language or purposes: contractors during the Civil War could not have escaped liability by arguing that the defective rifles or shoddy uniforms were not "worthless" to the Army. Whether the goods or services are worth nothing, or just worth less than what the government bargained for, it is "false or fraudulent" for contrac-

tors to bill the government for the full price of those goods or services.

C. Petitioner's Policy Arguments For Rejecting Implied False Certification Are Unpersuasive

Petitioner's position ultimately rests on policy arguments why this Court should narrow the FCA. *See* Pet. Br. 27, 38-40 (arguing for "solution[s]" to the FCA's supposed policy defects). But policy arguments cannot justify engrafting a requirement that is found nowhere in the statute's text and that directly contravenes Congress's broad remedial purposes in passing the Act. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("[p]olicy considerations cannot override [the Court's] interpretation of the text and structure of [a statute]"). In any event, petitioner's policy arguments are unpersuasive.

1. Implied false certification liability does not render express certifications of compliance surplusage. Petitioner misunderstands the role that express certifications play in the FCA regime. An express certification has never been understood to be necessary to establish that a claim is "false or fraudulent." Contrary to petitioner's suggestion (at 36 & n.6), the government often does not require an express certification even as to compliance with conditions that are essential to the integrity of its programs.[17] The

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[17] *See, e.g.*, *Hutcheson*, 647 F.3d at 392-94 (Medicare claims tainted by kickbacks to physicians in violation of the federal Anti-Kickback Statute); *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1169, 1176-77 (9th Cir. 2006) (claims for payment of Title IV funds tainted by university's violations of Department of Education's incentive compensation ban in enrollment counselor compensation programs).

government's efforts to protect those programs from fraud thus depends critically on implied false certification liability.

When the government does require an express certification, it serves the important government interest of easing the plaintiff's burden of proof on the FCA's separate materiality element, because the certification is strong if not conclusive evidence that satisfying the condition is important to the government's payment decision. *See* 31 U.S.C. § 3729(b)(4). Restricting the FCA to express certifications, however, would severely undermine the government's anti-fraud efforts by requiring it to anticipate unscrupulous contractors' myriad ingenious schemes.

2. Petitioner argues (at 39-41) that the Court should limit the FCA to express false certifications because the sheer number of regulations deprives contractors of fair notice of what is material. That argument is unpersuasive for three reasons. First, petitioner's cry of overregulation is overblown. CMS's health-care regulations – 130,000 pages worth by one count[18] – may sound voluminous, but they are economical given that Medicare and Medicaid cover nearly one-third of all Americans at a $1.1 trillion annual cost to federal and state governments. *See supra* pp. 5-6. Likewise, MassHealth's Chapter 429.000 regulations for mental health facilities comprise only 28 discrete sections.

Second, adequate notice often is not controversial because the requirement clearly affects the nature or quality of the good or service provided. When that is true, no one could reasonably doubt that the

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[18] *See* Schwartz & Goldberg, 51 Harv. J. Legis. at 350.

requirement affects the government's payment decision. *See supra* pp. 25-26.

Third, the FCA addresses any notice issues in hard cases by requiring that false claims be made "knowingly." And Congress's definition of knowledge as "actual knowledge," "deliberate ignorance," or "reckless disregard" strikes a careful balance between defendants' interest in advance notice and the government's interest in staying one step ahead of creative fraudsters. 31 U.S.C. § 3729(b)(1)(A); *see SAIC*, 626 F.3d at 1274-75. It is not "unfair" to expect government contractors to be familiar with the government's rules for participating in and receiving money from federal programs and to refrain from demanding payment when they are knowingly or recklessly violating those rules.

Petitioner complains (at 40) that even the FCA's relatively stringent knowledge standard is too lax, and it raises the specter of massive liability for good-faith mistakes. But sincere good-faith mistakes do not rise to the level of a "knowing" violation. *See id.* And petitioner cannot actually point to any concrete examples of miscarriages of justice, nor can it defend its own misconduct on that basis. *See infra* pp. 47-48, 53-55. To the contrary, the government's modest recovery rates, *see supra* pp. 6-7, indicate systemic *under-enforcement* of the anti-fraud laws.

"The need for a robust FCA cannot be understated." S. Rep. No. 110-507, at 6 (2008). Far from being a "sensible" rule, rejecting implied false certification liability would improperly undermine Congress's core objectives by creating a massive loophole in the FCA and leaving the federal and state governments vulnerable to all but the crudest frauds.

II. LIMITING IMPLIED FALSE CERTIFICATION TO THOSE MATERIAL REQUIREMENTS FORMALLY LABELED "CONDITIONS OF PAYMENT" IS UNJUSTIFIED

A. Petitioner's Express-Designation Requirement Has No Basis In The FCA

1. Petitioner argues that the "second-best solution" to the FCA's supposed policy defects is to restrict liability to "situations in which a defendant requests payment in violation of an expressly designated precondition to payment." Pet. Br. 28, 41. As a threshold matter, the Court need not address that contention, because the First Circuit interpreted the MassHealth regulations in this case as expressly conditioning Medicaid payment on adequate supervision, proper licensure, and employment on staff of a board-certified or board-eligible psychiatrist. *See* App. 16, 20-22; *supra* pp. 17-19. Under that interpretation, which this Court normally does not review, affirmance is warranted even assuming petitioner prevails on the second question presented. *See infra* Point III.

In any event, petitioner's "second-best" proposal is contrary to the FCA. As the vast majority of federal circuits correctly have held,[19] the relevant payment condition need not bear a formal label as long as it is material and the defendant demands payment while knowingly violating it. *See supra* Point I. Nothing in the FCA's text supports restricting it to violations of expressly designated payment conditions. *See, e.g.*, *Hutcheson*, 647 F.3d at 388 ("[T]he rule advanced by

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[19] All of the circuits cited above, *see supra* n.12, have rejected petitioner's rule, except the Second Circuit, *see Mikes*, 274 F.3d at 702, and the Sixth Circuit, *see Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011).

[defendant] that only express statements in statutes and regulations can establish preconditions of payment is not set forth in the text of the FCA."); *SAIC*, 626 F.3d at 1268 ("nothing in the statute's language specifically requires such a rule"). Indeed, Congress and this Court repeatedly have rejected such "rigid" and "restrictive" limitations on FCA liability. *Neifert-White*, 390 U.S. at 232.

Petitioner's distinction between a "condition[] of payment" and a "mere[] condition[] of participation," Pet. Br. 42 (internal quotations omitted), illustrates the artificiality of its proposed limitation. Conditions on a contractor's ability even to *participate* in a federal program are equally if not more important to the government compared to conditions on payment of a particular claim. Under petitioner's theory, a convicted felon who knowingly submitted ineligible claims would not be liable under the FCA unless the government specified, redundantly, that it does not make payments to those subject to mandatory exclusion from the program. The FCA does not mandate such bizarre results.[20]

2. Petitioner's efforts to root its rule in the FCA's text are unpersuasive.

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[20] *See, e.g.*, *McNutt*, 423 F.3d at 1259 ("[w]hen a violator of government regulations is ineligible to participate in a government program," yet "persists in presenting claims for payment that the violator knows the government does not owe, that violator is liable, under the [FCA], for its submission of those false claims"); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 442-43 (3d Cir. 2004) ("there should be FCA liability when non-compliance with the underlying regulations would disqualify the provider from participation" because it could "hardly . . be said that non-compliance . . . is irrelevant to the government's disbursement decisions") (internal quotations omitted).

a. Petitioner suggests (at 43) that a claim cannot be "false or fraudulent" unless the government gives advance notice by labeling the relevant requirement a "condition of payment." That argument is a non-sequitur. It conflates the question whether a claim is "false or fraudulent" with the question whether the false or fraudulent claim was made knowingly. *See also supra* p. 40. A claim is "false or fraudulent" if it seeks payment despite a violation of requirements that affect the contractor's entitlement to be paid. Whether the contractor was on notice that compliance with the requirement was important to the government's payment decision goes to the defendant's knowledge.[21]

b. Nor is it true that the FCA's knowledge requirement requires an "express connection between compliance and payment." Pet. Br. 48. Express designation is not necessary to establish even "actual knowledge," much less "deliberate ignorance" or "reckless disregard." *See* 31 U.S.C. § 3729(b)(1)(A). The government often can prove actual knowledge through other means, "such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue." *SAIC*, 626 F.3d at 1269. Moreover, it will often be self-evident to any reasonable person – and therefore deliberately ignorant or reckless not to know – that the requirement is a material payment condition. For example,

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[21] Petitioner also argues (at 47) that it is "implausible" that a claim for payment implies compliance with anything other than "expressly designated" conditions. A claim implies that the claimant is legally entitled to payment, however, and therefore that it has complied with all material payment conditions, whether or not expressly designated. *See supra* pp. 28-29.

"no one would doubt" that gasoline's octane rating is material to the government even if the contract does not expressly state the obvious. *Id.*

The government's express designation of certain legal requirements as payment conditions does not reasonably imply that all other requirements are immaterial to the government. Congress, executive-branch agencies, and state and local governments have legislated against the backdrop of overwhelming circuit law rejecting a rigid express-designation requirement. Moreover, "*[e]xpressio unius* just fails to work here," because petitioner cannot point to "that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81, 84 (2002). It thus is not credible to infer from the mere fact that the government did not label a requirement a "payment condition" that it intended to allow even deliberate violations of the most obviously material requirements to evade FCA liability.

Contrary to petitioner's submission (at 48-49), *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), does not support its position. *Safeco* held that, where there is more than one objectively reasonable interpretation of the Fair Credit Reporting Act's substantive prohibitions, a defendant does not act "willfully" if it adheres to an objectively reasonable (but ultimately incorrect) reading. *See id.* at 70. Even assuming *Safeco*'s interpretation of a different term in a different statute could properly be applied to the FCA's knowledge provision – a dubious premise well outside the questions presented – it is *not* objectively reasonable to infer from the absence of an express designation that the requirement is not a

material payment condition. Indeed, in the circumstances here, it should be apparent to any reasonable government contractor that requirements that affect the nature or quality of the goods or services provided are material to the government's obligation to pay for those goods or services.

c. Express designation also is not necessary to establish materiality. *See SAIC*, 626 F.3d at 1269 ("The existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not . . . a necessary condition."). Petitioner nonetheless argues (at 45) that implied false certification should be narrowed to compensate for Congress's "expansive[]" definition of materiality. *See* 31 U.S.C. § 3729(b)(4) (defining "material" as having "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"). As an initial matter, the FCA's familiar definition of materiality closely tracks other federal anti-fraud statutes,[22] including the federal securities laws.[23] At any rate, this Court should disclaim authority to rewrite one statutory provision based on perceived policy concerns with another one. And it should not functionally override Congress's deliber-

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[22] *See Neder*, 527 U.S. at 16 ("a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed'") (mail, wire, and bank fraud statutes) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)) (alteration in original).

[23] *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (whether "there is a substantial likelihood that a reasonable shareholder would consider [the fact] important in deciding how to vote"); *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195-96 (2013).

ate decision in the 2009 FCA amendments to reject the minority lower-court standard for materiality, which had required proof that the false or fraudulent claim actually changed the government's payment decision. *See* S. Rep. No. 111 10, at 11, 2009 U.S.C.C.A.N. 439.

B. Limiting Implied False Certification Would Severely Hamper The Government's Anti-Fraud And Abuse Efforts

1. Restricting implied false certification to expressly designated payment conditions not only is inconsistent with the FCA's text, but also would undermine Congress's purposes by creating a gaping loophole in FCA enforcement. Consider a typical government contract, which contains carefully negotiated provisions setting forth the terms on which the government is willing to pay for goods or services. Such contracts generally do not include express statements that compliance with material terms is a condition of payment by the government. In *Triple Canopy*, for example, the contract did not expressly state that marksmanship qualifications were a condition of the government's willingness to pay.[24] The reason for that is simple: a basic principle of contract law – and a matter of common sense for any government contractor – is that a party in material breach

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[24] *See also SAIC*, 626 F.3d at 1263 (contract did not expressly condition payment on contractor's compliance with contractual conflict-of-interest provisions); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1169-70 (10th Cir. 2010) (contract did not expressly condition payment on contractor's compliance with waste disposal requirements); *Shaw*, 213 F.3d at 527 & n.7 (contract did not expressly state that environmental remediation measures were a condition of payment).

of the contract "has no claim" to payment. Restatement (Second) of Contracts § 237 & cmt. d (1981).

The same holds true when the government sets out requirements regarding performance standards for reimbursement under federal programs such as Medicare and Medicaid. The government's requirements under those programs, like the terms of a contract, set forth the standards for the goods or services for which the government has agreed to pay. *See, e.g.*, *Wilkins*, 659 F.3d at 299-300 ("Organizations which provide services under Medicare do so pursuant to contracts with [CMS]."). Contractors should not be permitted knowingly to overbill the government under these programs simply because the government has not expressly stated the obvious point that compliance with those standards is a material condition of payment.[25]

2. This case illustrates the point. Lack of board licensure and inadequate supervision of staff are clearly material to the government because they result in medically unnecessary services and lower quality care or, worse, care that harms patient health. The government then bears the financial brunt of the adverse public-health consequences of that improper care. Here, had a properly board-certified or board-eligible psychiatrist treated Yarushka from the outset, and her care been properly supervised, at least some of her follow-up treatment may have been unnecessary, and she may not have suffered as severe adverse effects.

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[25] As this Court observed in *Hess*, programs involving federal aid to States, such as Medicaid, "are as much in need of protection from fraudulent claims as any other federal money." 317 U.S. at 544.

Given the importance of adequate supervision and board licensure to both public health and the government's payment decision, it is unsurprising that those requirements are not buried in an obscure provision of MassHealth's regulations. Unlicensed and unsupervised medical staff are not qualified to provide billable services to MassHealth. *See* 130 Mass. Code Regs. § 429.424. Two separate MassHealth regulations expressly make adequate supervision and board licensure conditions of MassHealth payment. *See supra* pp. 8-9 (citing § 429.439 and § 429.441). And numerous other MassHealth and DPH regulations reiterate those requirements. *See supra* p. 9; App. 18 (noting "repeated references to supervision throughout the regulatory scheme").

Massachusetts is not unique. The professional licensing laws of other States impose comprehensive supervision requirements for mental health practitioners.[26] In many States, clinical director Keohan's conduct would have been culpable negligence, justifying tort liability and revocation of his license. *See* Dennis P. Saccuzzo, *Liability for Failure to Supervise Adequately Mental Health Assistants, Unlicensed Practitioners and Students*, 34 Cal. W. L. Rev. 115, 117, 127-30 (1997) (discussing various means by which failure adequately to supervise mental health professionals may result in liability).

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[26] *See, e.g.*, Ohio Admin. Code 4732-13-04 (setting forth "[r]equirements for mental health worker supervision," including detailed responsibilities pertaining to both supervisors and supervisees); 24 Del. Admin. Code § 3500-9.2 (providing that unlicensed psychological assistants must be "supervised, directed, and evaluated by a Delaware licensed psychologist who assumes professional and legal responsibility for the services provided," and detailing the qualifications required of a supervisor and the necessary components of such supervision).

3. Beyond this case, petitioner's rule also would immunize other claims that are self-evidently "false or fraudulent" even in the absence of an express condition of payment.

- Billing for adulterated drugs manufactured in violation of federal standards under the Food, Drug, and Cosmetic Act. *See* DOJ, Press Release, *GlaxoSmithKline to Plead Guilty & Pay $750 Million to Resolve Criminal and Civil Liability Regarding Manufacturing Deficiencies at Puerto Rico Plant* (Oct. 26, 2010), http://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-pay-750-million-resolve-criminal-and-civil-liability-regarding.
- Billing for mental health services by facilities owned by a provider that had been excluded from the Medicare and Medicaid programs. *See* United States' Compl. in Intervention, *United States v. Martinez, et al.*, No. 5:11-cv-02756-LS (E.D. Pa. filed July 21, 2015).
- Billing for hospital care by a facility whose violations of staffing and sanitation regulations would have made it liable for termination from the Medicare program. *See United States ex rel. Landers v. Baptist Mem'l Health Care Corp.*, 525 F. Supp. 2d 972, 979-80 (W.D. Tenn. 2007).

Petitioner's policy complaints do not justify stripping critical government programs of protection from blatant fraud in such circumstances.

C. Petitioner's Policy Concerns Are Unfounded And Cannot Justify Rewriting The FCA

1. As with implied false certification liability generally, petitioner argues (at 43) that express designation is necessary to avoid unfairness to defendants. Petitioner even argues that express designation is necessary to avoid violating defendants' due process right to adequate notice. But this Court repeatedly has held that a statutory knowledge requirement alleviates any due process concerns regarding adequate notice. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) (citing cases). Fair notice and knowledge can often be readily proved even absent an expressly designated condition of payment. *See supra* pp. 40, 43-44.[27]

Petitioner also incorrectly asserts (at 43, 50) that an express-designation requirement is necessary to prevent the FCA from becoming "an all-purpose remedy" for merely "technical" violations of federal statutes, regulations, or contractual requirements. But the FCA has built-in protections against that concern. "[I]nstead of adopting a circumscribed view of what it means for a claim to be false or fraudulent," rigorous enforcement of the Act's existing knowledge and materiality requirements "will ensure that government contractors will not face onerous

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[27] Petitioner repeatedly states that the FCA's treble-damages provision is "'essentially punitive,'" although (unlike some of its *amici*) it avoids invoking the "rule of lenity." *E.g.*, Pet. Br. 44 (quoting *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000)). But this Court rejected any special rule of construction based on the FCA's treble-damages provision in *Cook County*. *See* 538 U.S. at 131-32 (noting that treble damages have compensatory purposes as well).

and unforeseen FCA liability" based on merely trivial violations and that "ordinary breaches of contract are not converted into FCA liability." *SAIC*, 626 F.3d at 1270-71.

2. Petitioner contends (at 54-56) that the FCA's knowledge and materiality requirements are too fact-intensive to protect defendants from a torrent of meritless lawsuits and forced settlements. But the empirical evidence does not substantiate those claims.[28] Plenty of FCA cases are dismissed at early stages,[29] and the government recovers only pennies

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[28] Even in the class-action context, empirical research does not substantiate the "blackmail" charge. *See, e.g.*, Charles Silver, *"We're Scared To Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003); Lance P McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 Am. J. Trial Advoc. 221, 227-28 (2007).

[29] *See, e.g.*, *McLain v. KBR, Inc.*, No. 1:08-CV-499 (GBL/TCB), 2014 WL 3101818, at *4-5 (E.D. Va. July 7, 2014) (dismissing complaint based on lack of materiality), *aff'd*, 612 F App'x 187 (4th Cir. 2015); *United States ex rel. Harris v. Dialysis Corp. of Am.*, Civil No. JKB-09-2457, 2013 WL 5505400, at *2-3 (D. Md. Oct. 1, 2013) (dismissing certain counts of complaint based on lack of materiality); *United States ex rel. Ge v. Takeda Pharm. Co.*, Civil Action Nos. 10-11043-FDS & 11-10343-FDS, 2012 WL 5398564, at *5-6 (D. Mass. Nov. 1, 2012) (dismissing complaint based on lack of materiality), *aff'd*, 737 F.3d 116 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014); *United States ex rel. Hill v. University of Med.*, Civil Action No. 03-cv-4837 (DMC), 2010 WL 4116966, at *2-5 (D.N.J. Oct. 18, 2010) (granting summary judgment based on lack of knowledge), *aff'd sub nom. United States ex rel. Hill v. University of Med. & Dentistry of New Jersey*, 448 F. App'x 314 (3d Cir. 2011); *United States ex rel. Stephens v. Tissue Sci. Labs., Inc.*, 664 F. Supp. 2d 1310, 1317-19 (N.D. Ga. 2009) (dismissing complaint based on lack of materiality).

for every dollar lost to fraud – hardly evidence of over-enforcement.[30]

In the unusual case where a private plaintiff asserts a tenuous claim, the FCA gives the government numerous levers to prevent such claims from resulting in unjustified liability. The government's power to intervene alone historically has had dramatic effects on case outcomes: between 1986 and 2011, 94% of all FCA recoveries occurred in intervened cases, and 60% of non-intervened cases were voluntarily dismissed.[31] The government also has other tools to ensure that FCA enforcement efforts focus on serious frauds: the threat of involuntary dismissal or settlement, *see* 31 U.S.C. § 3730(c)(2), and displacement of the relator as primary litigant, *see id.* § 3730(a), (c)(1).

Congress has recognized that, subject to DOJ's statutory powers, vigorous private FCA enforcement is a critical supplement to the government's limited enforcement resources. *See, e.g.*, S. Rep. No. 99-345, at 7, 1986 U.S.C.C.A.N. 5272 ("[P]erhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies."). And the FCA's *qui tam* provisions are critical in alerting the government to fraud in the first place. *See, e.g.*, S. Rep. No. 110-507, at 6-7

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[30] *See supra* pp. 6-7; *see also* David Farber, *Agency Costs and the False Claims Act*, 83 Fordham L. Rev. 219, 246 (2014) (noting "empirical data detailing a high incidence of frivolous nuisance value litigation is conspicuously lacking, especially in the FCA context").

[31] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 N.W. U. L. Rev. 1689, 1718, 1722 (2013).

(citing legislative findings regarding importance of whistleblowers); *Cook Cnty.*, 538 U.S. at 131 (Congress created *qui tam* provisions "to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government"). Here, for example, respondents' investigation prompted Massachusetts DPH's administrative investigation. *See supra* p. 14.

3. Petitioner's three cases of supposed FCA "abuses" actually illustrate how a rigid express-designation requirement would severely hamper the government's efforts to combat fraud and abuse.

In *United States v. Education Management Corp.*, 871 F. Supp. 2d 433 (W.D. Pa. 2012), the operator of a large post-secondary school network, Educational Management Corp. ("EMC"), provided unlawful incentive bonuses to its recruiters in violation of the federal Guaranteed Student Loan ("GSL") program's Incentive Compensation Ban, 20 U.S.C. § 1094(a)(20). EMC even developed a "sham" compensation plan to "cover up for [its] improper compensation practices." 871 F. Supp. 2d at 442; *see id.* at 449, 451 (referring to plan as "window dressing" and "camouflage").

The district court correctly rejected EMC's contention that the Incentive Compensation Ban was simply a "boilerplate" regulation that should not give rise to FCA liability. The ban is critical to the integrity of the GSL program because improper incentive payments lead schools to give loans to unqualified students who will not be able to repay, leaving the government holding the bag. *See id.* at 440. According to the complaint filed by DOJ and four States, EMC accepted literally every student who completed an application, regardless of qualifications. *See id.*

As a result, EMC's receipt of federal education funds increased rapidly, from $656 million in 2003-2004 to $2.578 billion in 2010-2011. *See id.* EMC faces multi-billion-dollar liability because, "[t]o put it starkly, Plaintiffs allege a coordinated, multi-billion dollar corporate-wide fraud." *Id.* at 448.[32]

Petitioner criticizes *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28 (D.D.C. 2003), because it held that compliance with the Medicare Anti-Kickback Statute and the Stark Law was a material precondition of Medicare reimbursement even before CMS added language to a Medicare reimbursement form to that effect. But as numerous courts have correctly held,[33] it requires no "speculation" to know that kickbacks are material, because they compromise the independent professional judgments of the health-care providers whose services the government has agreed to reimburse. Indeed, Congress created criminal penalties for the offering, solicitation, payment, or receipt of kickbacks by federal health-care providers. *See* 42 U.S.C. §§ 1320a-7b(b), 1395nn. The FCA did not require the government to reiterate that prohibition on its reimbursement form.

The violations in *SAIC* are equally egregious. There, the Nuclear Regulatory Commission ("NRC") hired SAIC to advise it on how best to regulate the disposal of contaminated nuclear waste – an issue

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[32] The district court found that the plaintiffs properly alleged not only implied false certifications but also factually false and expressly false claims. *See* 871 F. Supp. 2d at 451.

[33] *See, e.g.*, *New York v. Amgen Inc.*, 652 F.3d 103, 115 (1st Cir. 2011); *Hutcheson*, 647 F.3d at 392-93; *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008); *McNutt*, 423 F.3d at 1260.

with significant potential health and safety ramifications for the general public. *See United States v. Science Applications Int'l Corp.*, 653 F. Supp. 2d 87, 92-93 (D.D.C. 2009). Understandably, "SAIC's neutrality was critical" to the government. *Id.* at 93. But, unknown to the government, SAIC was simultaneously working as a subcontractor for companies on nuclear waste disposal projects that would be subject to the very regulations on which SAIC was retained to advise the NRC. *See id.* at 96-97; *SAIC*, 626 F.3d at 1262-63. SAIC's failure to disclose that basic conflict of interest was not a "minor" or "ancillary" infraction. 626 F.3d at 1271. It compromised the integrity of the consulting advice for which NRC bargained. Like petitioner's other examples, *SAIC* illustrates the need for rigorous FCA enforcement, not artificial limits on the Act's scope.

III. THE FIRST CIRCUIT CORRECTLY REVERSED DISMISSAL OF RESPONDENTS' COMPLAINT

The decision below should be affirmed because petitioner's position on both questions presented is contrary to the FCA. Even if the Court adopts petitioner's position on the second question presented, the judgment below still should be affirmed because the First Circuit correctly interpreted MassHealth regulations as making adequate supervision and board licensure express conditions of payment under Medicaid.

A. The First Circuit correctly held that UHS's failure to supervise the clinical staff who treated Yarushka violated an express payment condition under § 429.439. *See supra* pp. 17-18. Petitioner's challenge to the First Circuit's interpretation of MassHealth's regulations is not properly before the

Court. This Court "normally follows lower federal-court interpretations of state law," *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000), out of "great deference" to the circuit's familiarity with state laws within its jurisdiction, *McMillian v. Monroe Cnty.*, 520 U.S. 781, 786-87 (1997) (citing cases) (internal quotations omitted). Indeed, this Court refused to grant certiorari on the first question presented in the certiorari petition, which contested the First Circuit's reliance on § 429.439 and § 429.423. Pet. 12-14.

In all events, petitioner's reading is unpersuasive. Section 429.439(C) expressly designates as a payment condition compliance with "all of the requirements in 130 CMR 429.423(B)." 130 Mass. Code Regs. § 429.439(C). Section 429.423(B)(1) enumerates the qualifications the facility's clinical director must possess, and § 429.423(B)(2) establishes the clinical director's substantive job "responsibilities," including the responsibility of "overall supervision of staff performance." *Id.* § 429.423(B)(1)-(2). Both subparagraphs (B)(1) and (B)(2) impose "requirements" in the ordinary sense of legally binding obligations. Thus, contrary to petitioner's argument (at 57-58), the ordinary meaning of the phrase "*all* of the requirements in" § 429.423(B) includes not only the qualifications in § 429.423(B)(1) but also the substantive job duties in § 429.423(B)(2). Moreover, petitioner's reading is implausible because it would make little sense for MassHealth to care only about the director's formal training, and not about the fulfillment of his substantive duties.

If there were any doubt about the correctness of the First Circuit's reading of § 429.439, § 429.441 resolves it. Petitioner itself cites (at 8) § 429.441(F) as exemplifying an express condition of payment.

Subparagraph (A) of that same section expressly conditions Medicaid reimbursement on provision of care by a professional staff member as defined by § 429.424. And, as explained above, § 429.424 imposes detailed supervision requirements for each category of mental health providers. *See supra* p. 8.

B. The First Circuit also correctly held that petitioner's alleged failure to maintain a board-certified or board-eligible psychiatrist at Arbour violated § 429.439(C)'s express payment condition. In addition to adequate supervision, § 429.423(B)(2) requires the clinical director to "employ[] adequate psychiatric staff." 130 Mass. Code Regs. § 429.423(B)(2)(e). In turn, § 429.422(A) specifies that every "mental health center must have . . . three or more core professional staff members who meet the qualifications outlined in 130 CMR 429.424 for their respective professions"; "[o]f these, one must be a psychiatrist." *Id.* § 429.422(A).

The First Circuit perceived "some ambiguity" on the face of § 429.422(A) as to whether the board-certified-psychiatrist requirement applied to each satellite facility separately or to the entire "mental health center," including the parent and its satellites. App. 20 n.15. The court below correctly held, however, that DPH's regulations, which apply to Arbour, specifically state that each satellite facility must employ a board-certified psychiatrist "'independently of its parent clinic.'" *Id.* (quoting 105 Mass. Code Regs. § 140.330); *see also id.* (noting federal courts give controlling weight to state agencies' interpretation of their own regulations). Petitioner erroneously challenges (at 58-59) the First Circuit's reliance on DPH's regulations in interpreting the scope of § 429.423(B)(2)(e) on the ground

that DPH and MassHealth are separate agencies. In fact, both are part of the Executive Office of Health and Human Services, headed by a single Cabinet-level Secretary who has overall authority for both agencies' regulations.[34] Public health and government health insurance programs are closely related. *See supra* pp. 47-48 (explaining fiscal costs of inferior care). It is thus unsurprising that MassHealth provider regulations frequently incorporate DPH standards. *See, e.g.*, 130 Mass. Code Regs. §§ 429.432, 429.435. The First Circuit thus appropriately looked to DPH's specific staffing requirements for guidance as to § 429.423(B)(2)(e)'s standards. The court of appeals' interpretive approach – reading Massachusetts regulations in light of the State's particular administrative-law structure and practice – warrants this Court's respect given the experience of the regional federal circuits in construing state law. *See supra* p. 56.

CONCLUSION

The court of appeals' judgment should be affirmed.

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[34] *See* Mass. Gen. Laws ch. 6A, § 16; *id.* ch. 118E, § 2; *id.* ch. 17, § 2; *see also* http://www.mass.gov/eohhs/gov/departments/.

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